

STATE OF MICHIGAN
IN THE SUPREME COURT

DONA REGAN and BRIAN REGAN,

Plaintiffs/Appellees,

Supreme Court No. 124163

Court of Appeals No. 219761

v

Washtenaw Circuit Court
No. 97-4017 NI

DAVID CAVANAUGH and
WASHTENAW COUNTY
ROAD COMMISSION,

Defendants/Appellants.

124163
Suppl

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**SUPPLEMENTAL BRIEF ON BEHALF OF DONNA REGAN
AND BRIAN REGAN (PLAINTIFFS/APPELLEES)
PURSUANT TO COURT ORDER DATED JUNE 11, 2004**

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INTRODUCTION/PROCEDURAL POSTURE

The parties have been instructed by this Court's Order of June 11, 2004 that the Application for Leave to Appeal from the June 10, 2003 Judgment of the Court of Appeals is being considered. Pursuant to MCR 7.302(G)(1) oral argument will be scheduled on the question of whether to grant the Application or take other peremptory action. The parties were directed to include in their Briefs among the issues addressed the following:

“(1) Whether the tractors in question were motor vehicles, see Stanton v. City of Battle Creek, 466 Mich 611 (2002); and (2) whether at the time of the accidents the tractors were being operated as motor vehicles.”

This is the Supplemental Brief filed on behalf of Donna Regan and Brian Regan, Plaintiffs-Appellees, pursuant to that Order of this Court.

COUNTER STATEMENT OF FACTS

At approximately 1:55 p.m. on Tuesday, May 16, 1995, Mrs. Dona Regan's shift ended at the Saline McDonald's restaurant where she worked. A devoted wife and mother of two, Mrs. Regan was, by anyone's standards, a hard worker. Not only did she work at McDonalds for up to forty hours a week, she held another full-time job as a bus driver for the Clinton Public Schools, where she had an exceptional record. In addition to her 25-38 hours per week managerial responsibilities at McDonald's, Mrs. Regan was also employed by the Clinton Public Schools as a full-time school bus driver.¹ That day she was scheduled to drive the Clinton High School track

¹ Mrs. Regan is not only a safe driver, but one who made a living, since 1986, for more than a decade by safely driving children to and from school and other activities. Over those years she compiled an exemplary record. She always kept up with continuing training sessions and despite her injuries kept current through summer 1996.

team to a meet later that afternoon. With two kids and two jobs, Mrs. Regan took tremendous pride in her work ethic.

On this day, her justifiable pride in her life as she had lived it would disappear like so much dust in the wind.

Enter the Washtenaw County Road Commission.

Mrs. Regan drove that afternoon along her usual route along U.S. 12 by Saline. On that nice, windy day, along the same stretch of road, the Washtenaw County Road Commission was working to re-grade the shoulders on a stretch of U.S. 12 between Saline and Clinton. This optional (not emergency) re-grading process involved five Road Commission vehicles, each of which had a specific function. The first vehicle, a grading truck, was equipped with a metal blade which dragged loose dirt and gravel from the shoulder to the left, towards the paved road. The second vehicle, a heavy tandem truck, did virtually the same thing as the first truck, except that it dragged the loose dirt and gravel back to the shoulder. The third vehicle, a tractor with a rear-mounted rotary broom, was operated that day by Defendant David Cavanaugh. His job was to sweep the excess dirt and gravel off the pavement. The fourth vehicle was a heavy roller which compacted the gravel down, smoothing out any ruts. The fifth vehicle pulled a small sign-board trailer. A sixth truck occasionally used in this convoy, a water truck, was not on this job that day. The purpose of the water truck was to prevent large amounts of dust from swirling in the air and obstructing drivers' views.

As many witnesses – including several Road Commission employees – have consistently testified, it was a very windy day:

– “Q: Do you recall it being a particularly windy day?

A: Yes. **It was fairly windy.** Not like horrible, but it was – it wasn't calm." (Naebeck deposition page 20, lines 8-11)

– "Q: How would you describe the weather conditions that afternoon?

A: Hot and dry.

Q: What about the wind?

A: **Little windy.**" (Stephens deposition page 17, lines 19-23)

– "Q: And what is your recollection of what the weather conditions were like that day?

A: It was sunny. The temperature was approximately 65 to 70 degrees. **Extremely windy, gusty winds at times.** A lot of the time the gusty winds were there. Other times it was normal." (Regan deposition page 40, lines 14-19)

– "Q: Now, earlier in describing the were [sic] you said that there were gusty winds. How did you know there were gusty winds?

A: You could feel them.

Q: What do you mean you could feel them?

A: **When you're driving and it's really windy, you can feel the wind move your vehicle.**

Q: Was your van swaying?

A: No.

Q: Were you being caused to move from one side of the lane to the other as a result of these gusty winds?

A: You just grip the steering wheel harder and drove careful.

Q: What I'm asking, though, was that gusty wind pushing your vehicle within the lane of travel?

A: I think so.

Q: What do you mean you think so?

A: I was in my lane going westbound and there were times when you could feel the wind pushing from north-south and you could feel them occasionally. It wasn't enough to push you in another lane, but you could feel the resistance of the winds." (Regan deposition page 55, lines 3-24)

– "Q: What do you recall about the weather conditions that day?

A: I don't know the exact temperature . . . it was warm. There was a very high wind going, I would say, north to south day. **It was a very odd wind, very sporadic.** I have a full-size van which doesn't handle wind very well . . . So **I know it was high winds that day but it was kicking up dust periodically along 12.**" (Junkins deposition page 8, lines 2-23)

Mr. Cavanaugh himself testified that gusts of wind periodically came along that day and created large dust clouds:

– "Q: Were there times that day when it would get – when **a gust would come along and just blow up a large amount of dust and stuff?**

A: **Occasionally.**

Q: So thick that at least for a brief time you couldn't even hardly see where you're going?

A: I could always see where I was going. **I don't know what it was like in back of me, though.** (Cavanaugh deposition page 27, line 19 - page 28, line 1)

– Q: Okay. I understand most of the time it was probably okay, but **were there times when there would be all of a sudden a quick swirl and the wind would change directions and swirl and kick up a thick fog of dust?**

A: **Occasionally.** (Cavanaugh deposition page 28, lines 11-16)

– "Q: You don't have any sensation, at this point at least, that this accident occurred in the midst of a large cloud or swirl of dust?

A: I don't know. I mean, it just – if I remember, **it was near like a valley or a lower part. The dust could have held right in that spot.**" (Cavanaugh deposition page 28, line 25 - page 29, line 5)

The dust cloud was so thick that no one, including Mrs. Regan and Mrs. Junkins, even saw the accident itself.

All the workers knew that the dust was a problem, and even talked about it, but failed to take any action to correct the problem. Instead, one of them intentionally drove straddling the pavement's edge, so the vehicle would unavoidably kick up a dust cloud. This straddling of pavement's edge under the circumstances is the essence of Defendant's negligence in operation of the motor vehicle that day. One of the workers in the convoy related the discussion:

– **“Q: Had there been any discussion earlier in the day about the conditions being not right for the kind of operation you were doing, and there might have been some indication that maybe you should stop that kind of work for the day?”**

A: Yes, there was.

Q: Who had that discussion?

A: Happened during our lunch, and I think it was just the whole group talking about how hot and how dry and dusty that it was. I can't recall any certain person.” (Samuel Stevens deposition pps. 18-9)

He further went on:

“Q: Did anybody from the crew call in to headquarters with your concerns about the conditions that day?”

A: No, we didn't.” (Samuel Stevens deposition p. 19)

Even more damning:

– **“Q: You know, the discussion that you had about the conditions, what was the consensus, or what was being discussed about it?”**

A: Just it being hot and dry and dusty.

Q: But why would that be a concern?

A: Well, due to the stretch of road that we were on. I don't know if you've been up or down US-12, but it's a lot of curves.

And we just thought it was kind of dusty to be in those curves.” (Samuel Stevens deposition pps. 23-4).

Defendant Cavanaugh actually admits that he knew his vehicle was causing extremely dense dust clouds:

Q: Okay. I understand most of the time it was probably okay, but were there times when there would be all of a sudden a quick swirl and the wind would change directions and swirl and kick up a thick fog of dust?

A: Occasionally. (Cavanaugh deposition p. 28)

What we have here is a recipe for disaster. Five large vehicles moving slowly in a 55 mile per hour zone, on curvy roads, partially obstructing a traffic lane, creating dust clouds so dense that drivers can't and don't know that there are vehicles obstructing their lane of travel. The truly sad part is that the drivers themselves actually knew they were creating a situation where an accident was likely to occur.

And to no one's surprise, it did.

If this isn't operating vehicles in a negligent fashion, what is?

So now we have Mrs. Regan tooling along the road in her van. She sees the convoy ahead and slows down. Suddenly, a huge cloud of extremely dense dust swirls into the road. Visibility is down to absolute zero. The sweeper creating the dust and driven by Defendant Cavanaugh is hanging out into Mrs. Regan's lane. He of course knows this, but just keeps driving along. Mrs. Regan can't and doesn't know. He knows he's practically invisible, but it doesn't apparently bother him. The inevitable accident occurs, just as the Road Commission workers thought it would.

Mrs. Regan first noticed Mr. Cavanaugh's tractor when she was, by her estimates, at least a quarter to a half mile away from him. At this point she was traveling approximately 40 miles per hour.² When she noticed the Road Commission signs indicating work was in progress ahead of her, she slowed down even further.

– “Q: You had seen these type of signs out on US-12 before?

A: Yes.

Q: As a driver, did that cause you to change the way you were driving your vehicle in any way?

A: Certainly.

Q: Explain what happened?

A: Well, you slowed down.

Q: And you slowed down to what speed?

A: When I –

MR. BLASKE: I think that's been asked and answered already.

A: When I went around the corner, I was already at 40, I was already slowing it down, because it kind of – the map here shows it is straight, but it is not. You have just a little bit of a curve and then it goes into the curve here. So I was slowing the speed at Willow more. When I went around the curve, I know that I was going 18, 20, 24 miles per hour, because I had looked.” (Regan deposition page 51, lines 5-24)

– “Q: And you know that how?

A: I had looked down.

Q: At the speedometer?

A: Yes, sir.” (Regan deposition page 52, lines 9-11)

² Although the posted speed limit is 55 miles per hour, she had slowed down to allow a car in front of her to turn left off US-12 onto southbound Willow Road.

At this point she was only a quarter mile away from Mr. Cavanaugh. As she moved closer – approximately two to three van lengths behind Mr. Cavanaugh’s tractor³ – an enormous dust cloud enveloped her car, completely blocking her vision past the nose of her van.

First, Mrs. Regan testified what it was like being inside this huge dust storm:

– “Q: And just before this dust cloud came up you had no trouble seeing the tractor; is that correct?

A: That’s correct.

Q: Tell me what happened, then.

A: **It was instantaneous. It was a sand-out, I guess you would call it. It was like a curtain or somebody put a bag over your head. You couldn’t see anything. Dense fog was better to see than this.**” (Regan deposition page 69, lines 10-17)

The sadly funny part of this story is that even other Road Commission drivers couldn’t see the sweeper themselves, even though they knew it was there, because the dust was so dense. The only way the other workers knew that an accident had happened at all was that the dust cloud suddenly disappeared. That was because Mrs. Regan struck the portion of the sweeper occupying her lane, causing the sweeper to stop making its deadly cloud. Barring having psychic powers which would allow her to “know” there was a vehicle in her lane, there was absolutely no way she could avoid a vehicle she couldn’t see.

Susan Junkins, a key witness who was traveling directly behind Mrs. Regan at that point of the accident, testified that she lost all sight of Mrs. Regan’s van when it entered the dust cloud.

– “A: Then immediately surrounding in front of this truck was this humongous dust ball. It went all the way across Michigan Avenue onto both shoulders. It was probably 20-25 feet high. It was a very scary thing because you could not see beyond it. That’s when I first knew that there was some danger ahead.

³ Regan deposition page 66, lines 15-20.

Q: If I'm understanding what you told me correctly, and I want to be sure, I'm not trying to put words in your mouth, this is a large cloud of dust?

A: Uh-huh.

Q: Thick to the point – were you able to see – did you lose visual contact with Dona's vehicle?

A: Absolutely.” (Junkins deposition p. 15)

Sam Stephens, who was operating the truck immediately in front of Mr. Cavanaugh, testified that the huge dust cloud came up all of a sudden and completely obscured his co-worker from sight.

– “Q: When was the first time that you realized that there had been a problem?

A: When I looked back out of my rear-view mirror and didn't see Dave behind me. At that point, I stopped my truck to find out what was going on.

Q: What did you see?

A: Nothing but dust.” (Stephens deposition p. 11)

This was a dense dust cloud that could have been prevented. This was a dense dust cloud that should have been prevented.

Mr. Cavanaugh should not have been blocking part of the lane for travel when he knew his dust was making his vehicle invisible to traffic. He did. This act was his driving negligence which caused this accident.

He did it anyway.

As a result, Mrs. Regan will never be the same.

As a direct result of the injuries she suffered in the accident, Mrs. Regan has since been fired from her bus driving position. Although she has returned to McDonald's (in a different

capacity), she still lives with residual soreness and pain, along with bouts of excruciating pain that are often triggered by the softest handshake. At other times her pain is spontaneous. Mrs. Regan still lives in fear that, if the pain should strike when she is driving, she will lose control of her vehicle and possibly hurt innocent people.

And it all could have been avoided if some guys talking at lunch had acted responsibly thereafter. If they had only done what they told each other they should.

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ARGUMENT

In Stanton, the Court concluded that a forklift was not a “motor vehicle” because it did not match the dictionary definition of a “motor vehicle” as “an automobile, truck or similar motor driven conveyance,” but because it was, rather, in the Court’s characterization, “a piece of industrial construction equipment.” 466 Mich at 617-618.

In this case, the road sweeper involved is depicted in the two attached photographs.

- More than anything, it looks like a tractor. Note, however, the standard orange triangular slow vehicle warning sign on the back of the vehicle. That slow vehicle warning sign means that everybody contemplated that this vehicle would be - as it was - used on the roadway.
- Although admittedly it is not “an automobile [or] truck. . .” it is, in the language of the Stanton case, a “similar motor driven conveyance. . .”
- It also had rubber tires for use on the highway.
- The vehicle which caused Mrs. Regan’s crash was lawfully (albeit negligently) being driven on a public highway at the time, and it was licensed to be there.
- It was a “motor driven conveyance” which is certainly similar to a “automobile” or to a “truck” with “rubber tires for use on highways.” 466 Mich at 617 (and also footnote 9).
- The road sweeper at issue is “self-propelled” and is not “industrial equipment” and is even – unlike a front-end motor or other “construction equipment” – subject to registration under the Motor Vehicle Code. In fact this vehicle was registered under

the Motor Vehicle Code, which, although Stanton makes clear is not determinative, still may be a factor for the Court to consider.

- The tractor road sweeper vehicle in question reached the place of the crash by way of the highway itself, and thus it was capable of and was in fact specifically employed for travel on the highways and transport of Mr. Cavanaugh, its driver, to the location of the crash.

The Regan-crash vehicle is thereby no way comparable to the off-road industrial equipment (a forklift) which was at issue in Stanton.

It clearly was the negligent operation of a motor vehicle (the sweeper) that caused this accident. The Defendants knew it was windy, knew it was dusty, knew the roads were curvy, knew the sweeper was invisible occasionally when the dust clouds kicked up, and knew the sweeper was partially blocking a lane of the highway. Despite knowing all this, and despite discussing the problems the very day of the accident, Defendants chose to act in a negligent manner and proceed with their work. This is no different than a drunk driver choosing to get behind the wheel and putting everyone else on the road at risk. Maybe somebody will get hurt, maybe they won't. Unfortunately, like in the case of a drunk driver, it's usually the other guy that suffers most. Which is exactly what happened here. **"The Legislature also provided, however, that all governmental agencies, including counties, are liable for damages resulting from the negligent operation of their motor vehicles. Such agencies do not enjoy immunity from a lawsuit alleging negligent operation of a motor vehicle".** Baku v. Sanilac County Road Com'n, 419 Mich 202, 206-7 (1984).

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Moreover, and more damning, Defendant Cavanaugh drove his sweeper partially onto the traveling lane, a negligent act of driving which endangered anybody unfortunate enough to become enveloped in the dust cloud which he very well could - and should - have predicted.

It is uncontested that:

- Defendants knew it was dusty
- Defendants knew it was windy
- Defendants talked about the problem before the accident occurred
- Defendants continued operating their vehicles as they had been, driving while straddling the road's edge despite knowing about the risk they were creating for unsuspecting drivers.
- Defendants knew the sweeper was jutting out into the troubled lane when it kicked up dense clouds of dust.
- "But for" the actions of Defendants Dona Regan would not have been injured
- Dona Regan suffered and continues to suffer as a result of the accident.

Defendant's act of driving a motor vehicle partway on and partway off the road - thereby raising the dense, dark and large dust cloud which was the immediate and precipitating cause of the accident in question -comes within the motor vehicle exception to governmental immunity.

Under MCLA 691.1405; MSA 3.996(105):

"Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being Sections 257.1 to 257.923 of the Compiled Laws of 1948."

Defendant-Appellant does not deny that the sweeper is a “motor vehicle” within the meaning of MCLA 691.1405. See, Harder v Harder, 176 Mich App 589, 591-592 (1989). In addition, Mr. Cavanaugh was undoubtedly an “employee” of the Board of County Road Commissioners of Washtenaw County on September 12, 1996. MCLA 691.1405, supra. There is also no dispute that the Road Commission was the “owner” of the vehicle. Id.

Rather, Defendant-Appellant argues that this accident did not arise from the “operation” of the motor vehicle, but rather from negligent road maintenance, and relies heavily upon Peterson v Muskegon County Board of Road Commissioners, 137 Mich App 210 (1984), to avoid liability.

Peterson is not on point.

In Peterson, the “plaintiff was allegedly injured when his vehicle hit a patch of ice and snow on US-31,” ice and snow which were there because the defendant, “in snow plowing an overpass... plowed the snow and ice onto US-31.” 137 Mich App 210, 211. The plaintiff claimed “that ice and snow was thrown off the bridge” and “formed into ridges of ice and snow thereby creating a highly dangerous condition.” Id. The alleged “negligent act” had occurred long before the accident resulting in the plaintiff’s injuries. This Court held that, under those circumstances, the victim motorist could not bring an action against the Road Commission under MCLA 391.1405 supra, because the essence of the complaint was negligent plowing of snow, not negligent operation of the snow plow.

Peterson might apply if Cavanaugh had left a pile of dirt and gravel on the highway, which Mrs. Regan ran over sometime later, resulting in an accident and injury; or if she were suing on the theory that the County had negligently left the pile of dirt or gravel on the side of the road. But that is neither what happened, nor is it Mrs. Regan’s theory.

In this case, Mrs. Regan claims that Mr. Cavanaugh negligently operated the vehicle, resulting in her injuries. Mrs. Regan does not rely upon the creation of a potential hazard through road and shoulder sweeping activity, but rather, the fact that Cavanaugh drove by straddling the road's edge, making a dust cloud which he knew he would, thereby obscuring the view of Mrs. Regan and all other vehicles on the road. The negligent operation of the vehicle created an immediate, actual hazard (a huge, dark dust cloud), causing the crash and Plaintiff's serious injuries. Indeed, in Peterson, this Court stated, quoting from the Circuit Court's decision, that "if in fact the snow and ice were plowed directly upon the plaintiff as he approached, this case would have been more likely to survive the motion for summary judgment." 137 Mich App 210, 212. That language makes it clear that this case is one which survives Peterson analysis.

Michigan Northern Railway v Auto-Insurance, 176 Mich App 706 (1989), is also cited by Defendant-Appellant. As in Peterson, the hazard alleged in Michigan Northern, a pile of dirt on the train tracks left earlier by a Road Commission employee plowing over a railroad crossing, causing a subsequent train derailment, did not arise from the operation of the motor vehicle, but rather, from the act of plowing the road. This Court relied upon Peterson, supra, in so concluding. 176 Mich App 706, 712-713. This Court, as it had in Peterson, applied the "time and place" test, noting that "it was not the operation of Defendant's vehicle that caused the accident, but the residual effect of the act of plowing or grading the road." 176 Mich App 706, 712. It was this "distinction" which was "crucial to the resolution of [the] issue." The same distinction just does not exist under the facts of this case.

Application of the "time and place" test to the facts of this particular case necessarily yields the conclusion that the Circuit Judge correctly denied Defendant's Motion for Summary

Disposition. The creation of the dust cloud making it impossible for Mrs. Regan to see ahead on the road that day is not merely a residual effect here, but rather, was the direct result of the operation of the vehicle, and a necessary part of the accident itself, more than contemporaneous with, but indeed, its immediate and direct cause, in terms of both place and time.

This Court has consistently held that “negligent operation” of a motor vehicle within the meaning of MCLA 691.1405 occurs so long as the vehicle “is being used or employed in some specific function or to produce some desired work or effect.” Wells v Dept. of Corrections, 79 Mich App 166, 169 (1977); citing Orlowski v Jackson State Prison, 36 Mich App 113, 116 (1971); Nolan v Bronson, 185 Mich App 163, 177 (1990). In Wells, the plaintiff’s decedent, a prisoner, “became entangled in the power take-off shield of the tractor and received fatal injuries.” 79 Mich App at 167. In this case, Mrs. Regan makes an issue concerning Mr. Cavanaugh’s conduct, that is, his driving by straddling the road’s edge thereby causing the dust cloud which caused this crash. Plaintiff’s injury is one “resulting from the operation of a motor vehicle.” Wells, 79 Mich App 166, 168.

In Orlowski, supra, the “negligent operation of the motor vehicle” consisted of the failure to properly fasten a truck’s tailgate, so that the men in the back were not protected from “falling out or being thrown from the truck while it was in operation.” 36 Mich App 113, 116-117. This Court, quoting from a non-Michigan decision, stated:

“To be in operation, the vehicle must be in a ‘state of being at work’ or ‘in the active exercise of some specific function’ by performing work or producing effects at the time and place the injury is inflicted.” [36 Mich App 113, 116].

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In this case, the sweeper vehicle was unquestionably performing work, and producing effects, at the very time and place that Defendant inflicted this injury upon Mrs. Regan. Such operation caused the accident.

In Kuzinski v Boretti, 182 Mich App 177 (1989), a City of Southfield ambulance struck the plaintiff's vehicle. The driver of the ambulance had taken the vehicle from a Southfield Fire Station without the City's permission. Unsurprisingly, this Court affirmed a grant of summary disposition in favor of the municipality, because MCLA 691.1405, supra, clearly does not encompass a failure to prevent a thief from obtaining the vehicle without the owner's permission. But in so holding, this Court noted that "operation" includes "actual physical control of a motor vehicle upon a highway," and "being in actual physical control of a vehicle." 182 Mich App 177, 179-180; citing Motor Vehicle Code provisions, MCLA 257.36; MSA 9.1836 and MCLA 257.35a; MSA 9.1835 (1). Again, these definition concepts easily extend to the facts of the present case, as Mr. Cavanaugh was in "actual physical control of" the sweeper vehicle.

In its decisions, this Court has focused upon the injury-producing mechanism, and determined that MCLA 691.1405 ("the motor vehicle" exception to governmental immunity) applies where the negligent act involving the use of the motor vehicle is contemporaneous in place and time to the occurrence of the accident itself. Nolan, supra.

The basic principles which this Court employs in deciding issues concerning the scope of MCLA 691.1405 dictate this Court's conclusion that this case falls within the motor vehicle exception. The sweeper vehicle was in operation, within the physical control of a Road Commission employee, and directly inflicted the injury-producing mechanism on Mrs. Regan. "[C]ounty road commissions are liable for the negligent operation of their motor vehicles even

though liability is incurred in connection with the construction, improvement, or maintenance” of the highway. Baku v Sanilac County Road Commission, 419 Mich 202, 203 (1984) (emphasis added).

This Court should affirm the Court of Appeals.

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RELIEF REQUESTED

For the reasons stated in this brief, Plaintiff/Appellee, Donna Regan, respectfully asks this Supreme Court to affirm the Court of Appeals and to affirm the Circuit Court's denial of Defendant's Motion for Summary Disposition.

Dated: July 14, 2004



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